Supreme Court, U.S.
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No. 98-1018

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

CHOWCHILLA WATER DISTRICT AND
MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE
COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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I.
INTRODUCTION

It is a strange feeling to have the Federal Government, who for eight years of litigation in the District Court vigorously supported the arguments presented to this Court by the Non-Federal Defendants, suddenly change their position during appeal and take the position that Certiorari should be denied even though they disagree with the conclusions of the Circuit Court.

This is especially disturbing when the very structure of the Friant Unit of the Central Valley Project is at stake. Hundred of thousands of acres of the most productive farm lands in the nation are subject to having their essential water supplies reduced to a point that the lands may become barren.

For over fifty years all of the flows of the San Joaquin River, other than flood flows and releases to meet riparian rights between Friant Dam and Gravelly Ford, have been diverted at Friant Dam to meet the contractual requirements of the Non-Federal Defendants. Except for occasional spring flood releases, the river has been dry between Gravelly Ford and Mendota Pool. This has been done with the consistent knowledge of Congress.

NRDC now attempts to change the project operation by requiring releases from Friant Dam under California Fish & Game Code § 5937 to re-establish a Salmon run which has been non-existent for over fifty years. The cost will be to take a major portion of the firm yield of the project away from the contractors in the Friant Division to accomplish NRDC's stated purpose.

II.
FACIAL PREEMPTION OF SECTION 5937 BY THE CVPIA

The Circuit Court held that there was "no clear directive in the CVPIA which preempts the application of § 5937 if the State law could be implemented in a way that is consistent with, Congress' plan to develop and restore fisheries in a manner that is 'reasonable prudent, and feasible.'" (Emphasis added)

By this statement, the Circuit Court acknowledges that the plan must come from Congress, not the State.

If Congress develops a plan to restore fisheries that is "reasonable prudent, and feasible," it will direct the Secretary to comply with the plan adopted by Congress, and to release water from Friant Dam pursuant thereto.

On the other hand, if Congress determines that there can be no plan to restore fisheries which meets the requirements of "reasonable prudent, and feasible," it will do nothing. The Secretary must then comply with the CVPIA and make no releases from Friant, as Congress has directed.

In any event, it is Congress, not the State under § 5937, who must make the determination whether or not to require releases.

III.
REMAND IS NOT NECESSARY

Federal Defendants assert that the case should be remanded to the district court to determine "whether the

application of that section (§ 5937) to the Friant Unit is inconsistent with the overall CVPIA scheme and is therefore preempted."

This Court in *California v. United States,*438 U.S. 645,674-5, this Court held that Section 8 of the Reclamation Act subjected distribution of reclamation water to state law unless that law is inconsistent with congressional directives.

The Ninth Circuit elaborated in *U.S. v. State of Cal. State Water Resources,* 694 F.2d 1171,1176:

> **". . . a statute or regulation is preempted by a federal rule 'to the extent it conflicts with a federal statute,' or where it 'stands as an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress.'" (Emphasis added)**
>
> **"[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." Id. (Emphasis added)**

Where do we look to determine the "important federal interest served by the congressional scheme?" Obviously to congressional intent as manifested by Congress' actions over the past fifty years and its current intent as manifested by the directive to the Secretary in the CVPIA.

Prior congressional intent was set forth by this Court in *United States v. Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950), *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950) an *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) all extensively set forth in our opening Petition. Each of these cases set forth that congressional intent was that the river remain dry.

The current congressional scheme is abundantly clear in the CVPIA directive to the Secretary not to release water from Friant Dam for fish restoration without an act of Congress.

In *Dugan v. Rank,* 372 US 609, 83 S Ct. 999, 10 L Ed 2d 15, (1963) the district court had ordered the United States to construct ten collapsible dams between Friant Dam and Gravelly Ford to raise the river to its former height. This court stated at 372 US 620-21:

> "As the Court of Appeals found, the Project 'could not operate without impairing, to some degree, the full natural flow of the river.' Experience of over a decade along the stretch of the San Joaquin involved here indicates clearly that the impairment was most substantial--almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Government would, indeed, be 'stopped in its tracks' . . . (Emphasis added)

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> "Moreover, the decree would require the United States--contrary to the mandate of Congress--to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities." (Emphasis added)

Like the ten collapsible dams ordered by the district court in *Dugan*, a State mandated release of water under § 5937 to re-establish a salmon run would "prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Government would, indeed, be "stopped in its tracks."

What more is needed? This Court can put to rest the threat to the CVP and the contracting districts that the water supplies will be drastically cut to re-water a river that has been dry for over fifty years. Facial preemption of § 5937 under the directives of the CVPIA is clear. This Court is the final body to determine congressional intent. It should do so now.

IV.
THE RIGHTS OF CHOWCHILLA AND MADERA

The Federal Respondents do not address the substantive issues raised by Chowchilla and Madera. Instead, by a footnote they state that "those claims raise no issues of general importance warranting this Court's review."

To the contrary, the issue of "surrender of sovereign rights in unmistakable terms" abrogated in *United States v. Winstar* Corp. 116 S Ct 2432, 135 L. Ed.2nd 964 should be put to rest. Further, when a vested right has accrued prior to the adoption of ESA, Section 7 consultation is not a prerequisite to fulfilling that right. There is a conflict between the decision in this case and *Marbled Murrelet v. Babbit,* 83 F3d 1068, and *Sierra Club v. Babbitt,* 65 F3d 1502.

V.
CONCLUSION

Regardless of the importance of these claims, the § 5937 issue is vital to the continued operation of the largest Reclamation Project of all time. Certiorari should be granted.

Respectfully submitted,

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